In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 357

PHILIP CHARLES TESTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On October 25, 1963, in the United States District Court for the Eastern District of Pennsylvania, petitioner was called as a witness before a grand jury which was investigating possible violations of the Federal Communications Act (47 U.S.C. 501) and 18 U.S.C. (Supp. V) 1952 (interstate travel or transportation in aid of racketeering enterprises). After petitioner refused to answer questions on grounds of self-incrimination, petitioner, his attorney and the Assist-

ant United States Attorney responsible for the matter appeared before the district court. Government counsel stated that the questions which petitioner refused to answer before the grand jury related to possible violations of 47 U.S.C. 501, and that the petitioner was immunized from prosecution for matters concerning which he might testify by the provisions of 47 U.S.C. 409(l) (R. 4). The court told petitioner that this was so and directed him to answer questions before the grand jury (R. 4). When petitioner replied, "I refuse to answer any more questions, Your Honor", the court said (R. 5):

> Very well, I hold the witness in contempt of court, and I direct that he be committed to the custody of the Attorney General or his duly authorized representative until such time as he purges himself of this contempt.
>
> This is to be without bail.

Petitioner was then taken into custody. Thereafter, the court filed a certificate which recited, *inter alia*, that petitioner had been adjudicated in contempt of court under the provisions of Rule 42(a), F.R. Crim. P. (R. 6-7). The court of appeals affirmed the judgment and this Court denied a petition for a writ of certiorari. 326 F.2d 730, certiorari denied, 376 U.S. 931.[1]

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[1] While the case was pending on appeal, the grand jury returned an indictment which charged petitioner with having violated 47 U.S.C. 501 and 18 U.S.C., Supp. V, 1952. On March 17, 1961, after this Court had denied the petition for a writ of certiorari, the indictment was dismissed at the request of the government.

The instant proceedings were commenced on April 14, 1964, when petitioner filed in the district court an application for discharge from custody, alleging, *inter alia*, that his commitment was unconstitutional in that it was an indefinite sentence for criminal contempt (R. 8-9). On May 20, 1964, the court, treating the application as a motion to correct an illegal sentence under Rule 35, F.R. Crim.P., denied it without opinion (R. 13, 18). On July 9, 1964, the court of appeals affirmed *per curiam* (R. 29-31, 32; Pet. App. 9-11, 12). Bail was denied by the court of appeals and, on July 29, 1964, by Mr. Justice Brennan.[2] The grand jury in question is scheduled to expire on November 1, 1964.

There is no merit to petitioner's contention (Pet. 6-8) that, since the district court summarily adjudicated him in contempt of court and certified that it had proceeded under Rule 42(a), F.R. Crim. P., the commitment imposed was one for criminal contempt of court. As shown above, the commitment was clearly remedial and designed to coerce the petitioner into complying with the court's lawful order that he testify before the grand jury; it was not of fixed duration, nor was it designed to vindicate the authority of the court. As the court below put it (Pet. App. 10), "[t]he appellant's confinement, different from a puni-

[2] Petitioner has remained in custody since October 25, 1963, with the exception of the period from November 8 to November 18, 1963, when he was admitted to bail. Mr. Justice Brennan denied petitioner bail on January 9, 1964 (while the case was pending rehearing in the court below), and on January 21, 1964 (while the case was pending on petition for a writ of certiorari).

tive sentence, will be as brief or as long as he chooses * * *." See *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441-442; *United States* v. *United Mine Workers*, 330 U.S. 258, 303-305; *United States* v. *Barnett*, 376 U.S. 681, 753-754 (dissenting opinion). The only reason the procedure was summary was because petitioner made it so. After the court had directed him to answer the questions before the grand jury, petitioner stated that he refused to answer any more questions. At that point, the court was entitled, then and there, to impose appropriate sanctions, either by way of civil or criminal contempt. See *United States* v. *Brown*, 247 F.2d 332, 339 (C.A. 2), affirmed, 359 U.S. 41. It chose the former course.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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Since the judgment was remedial, the suggestion in *United States* v. *Barnett*, 376 U.S. 681, 695, fn. 12, of possible limitations on criminal punishment for contempt has no application. As the court below correctly noted (Pet. App. 10), "Mr. Justice Clark was speaking about an unqualified sentence imposed as a punitive sanction."

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